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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1987

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PAMELA J. BURAK, *Petitioner,*

*v.*

GENERAL AMERICAN LIFE INSURANCE COMPANY,
*Respondent.*

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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SAMUEL LEE ANDERSON
323 South College Avenue,
Suite 3
Fort Collins, CO 80524
(303) 482-4011
*Counsel of Record*

KENT N. CAMPBELL
323 South College Avenue,
Suite 3
Fort Collins, CO 80524
(303) 482-4011
*Counsel for Petitioner*

## QUESTION PRESENTED

The parties filed early cross motions for summary judgment to resolve a life insurance coverage issue. The sole issue raised was the effective date of coverage. Petitioner beneficiary was granted summary judgment. The court of appeals reversed and granted respondent insurer summary judgment.

The question presented is:

> 1. Whether a federal appeals court may, consistent with the requirements of the Fifth Amendment Due Process Clause, the Seventh Amendment right to jury trial and Fed. R. Civ. P. 56, grant summary judgment to an appellant rather than remand for trial when there are genuine litigable issues of material fact that were rendered moot by the trial court's grant of summary judgment but which were revived when the appeals court reversed?

The circuit courts of appeals are in conflict as to this issue and the Tenth Circuit Court of Appeals' directive appears to conflict with an applicable decision of this Court on this federal question.

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[Note: Petitioner reserves the right to argue the following question in the event certiorari is granted on the above question, but does not include the following question among the reasons for the grant of certiorari.]

> 2. Whether a court of appeals violates the *Erie* Doctrine when it construes an ambiguous life insurance policy endorsement against a widow beneficiary despite that controlling state law requires any ambiguity be construed against the insurer?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS AND RULE INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 7 |
| I. The Tenth Circuit's Order Granting Summary Judgment to An Appellant Rather Than Remanding for Trial Where There Remain Genuine Litigable Issues of Material Fact Conflicts With a Prior Decision of This Court and Presents an Important Question of Federal Law Which Should Be Settled If It Is Not Already | 7 |
| II. The Tenth Circuit's Decision Conflicts With the Decisions of Other Federal Courts of Appeals on the Same Matter For Which There Is Need for a Uniform Rule | 10 |
| III. The Decision Below Creates an Intra-Circuit Conflict Relating to a Recurring and Important Issue | 15 |
| CONCLUSION | 16 |
| APPENDIX (Opinion and Judgment of Court of Appeals, Order Denying Petition for Rehearing, Opinion and Order of the District Court, Judgment of the District Court, Amended Order of the District Court, Minute Order of the District Court and Fed. R. Civ. P. 56) | 1a |

TABLE OF AUTHORITIES

*Constitutional Provisions:* Page

United States Constitution, Fifth Amendment ..... 2, 13
United States Constitution, Seventh Amendment ..... 3, 14

*Cases:*

*UNITED STATES SUPREME COURT DECISIONS:*

*Commissioner v. Bilder*, 369 U.S. 499 (1962) ..... 13

*Dickinson v. Petroleum Conversion Corporation*, 338 U.S. 507 (1950) ..... 16

*Florida v. Rodriquez*, 469 U.S. 1 (1984) ..... 14

*Fountain v. Filson*, 336 U.S. 681 (1949) ..... 7, 8, 10

*Goldberg v. Kelly*, 397 U.S. 254 (1970) ..... 13

*Hanna v. Plumer*, 380 U.S. 460 (1965) ..... 10

*Hickman v. Taylor*, 329 U.S. 495 (1947) ..... 10

*Hormel v. Helvering*, 312 U.S. 552 (1941) ..... 7, 9, 10, 11

*John Hancock Mutual Life Insurance Company v. Bartels*, 308 U.S. 180 (1939) ..... 15

*Kennedy v. Silas Mason Company*, 334 U.S. 249 (1948) .... 9

*Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982) ..... 10

*Lugar v. Edmonson Oil Company*, 457 U.S. 922 (1982) ..... 7

*Mathews v. Eldridge*, 424 U.S. 319 (1976) ..... 13

*McNabb v. United States*, 318 U.S. 332 (1943) ..... 14

*Montoya v. Kennedy*, 366 U.S. 308 (1961) ..... 14

*Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) ..... 12

*Scarborough v. United States*, 431 U.S. 563 (1977) ..... 16

*Southern Construction Company v. Pickard*, 371 U.S. 57 (1962) ..... 14

*United States v. Doe*, 465 U.S. 605 (1984) ..... 7

*United States v. Rio Grande Dam and Irrigation Company*, 184 U.S. 416 (1902) ..... 9

*CIRCUIT COURTS OF APPEALS DECISIONS:*

*Black Warrior Electric Membership Corporation v. Mississippi Power Company*, 413 F.2d 1221 (5th Cir. 1969) ..... 11

*Burak v. General American Life Insurance Company*, 836 F.2d 1287 (10th Cir. 1988) ..... 1

*Capital Temporaries, Inc. of Hartford v. Olsten Corporation*, 506 F.2d 658 (2d Cir. 1974) ..... 15

*Case and Company, Inc. v. Board of Trade of the City of Chicago*, 523 F.2d 355 (7th Cir. 1975) ..... 15

*Eagle v. Louisiana and Southern Life Insurance Company*, 464 F.2d 607 (10th Cir. 1972) ..... 15

*Jones v. Nelson*, 484 F.2d 1165 (10th Cir. 1973) ..... 12

*M. Snower & Company v. United States*, 140 F.2d 367 (7th Cir. 1944) ..... 12

*Machinery Center, Inc. v. Anchor National Life Insurance Company*, 434 F.2d 1 (10th Cir. 1970) ..... 12

*Ozark Milling Company, Inc. v. Allied Mills, Inc.*, 480 F.2d 1014 (8th Cir. 1973) ..... 12

*Redhouse v. Quality Ford Sales, Inc.*, 511 F.2d 230 (10th Cir. 1975) ..... 13

*Roberts v. Hollandsworth*, 582 F.2d 496 (9th Cir. 1978) ..... 11

*Smith v. United States*, 362 F.2d 366 (9th Cir. 1966) ..... 10

*Tomalewski v. State Farm Life Insurance Company*, 494 F.2d 882 (3d Cir. 1974) ..... 11

*United States Trotting Association v. Chicago Downs Association, Inc.*, 665 F.2d 781 (7th Cir. 1981) ..... 15

*UNITED STATES DISTRICT COURT DECISION:*

*Robertson v. White*, 635 F. Supp. 851 (W. D. Ark. 1986) ..... 12

*STATE COURT DECISION:*

*Ponder v. Blue Cross of Southern California*, 145 Cal. App. 3d 709, 193 Cal. Rptr. 632 (Cal. Ct. App. 1983) ..... 6

*Statutes:*

28 U.S.C. §1254(1) ..... 2
28 U.S.C. §1291 ..... 6
28 U.S.C. §1332 ..... 2, 3
28 U.S.C. §2072 ..... 14
29 U.S.C. §1001 ..... 4

*Rules:*

Fed. R. App. P. 28(h) ..... 6
Fed. R. Civ. P. 56 ..... 3, 12

*Miscellaneous:*

6 J. Moore, *Federal Practice* Part 2, ¶56.27[2] (2d ed. 1987) ..... 10

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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The Petitioner Pamela J. Burak respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on January 12, 1988.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 836 F.2d 1287, and is reprinted in the appendix hereto, p. 1a, *infra*.

The order of the Court of Appeals denying rehearing has not been reported. It is reprinted in the appendix hereto, p. 8a, *infra*.

The order and opinion of the United States District Court for the District of Colorado (Kane, J.) has not been reported. It is reprinted in the appendix hereto, p. 9a, *infra*.

The judgment of the district court, amended order and minute order have not been reported. They are reprinted in the appendix hereto, pp. 17a, 18a and 19a, *infra*.

## JURISDICTION

Petitioner brought this suit in the District Court for the Eighth Judicial District of Colorado. Respondent removed the action to the United States District Court for the District of Colorado invoking jurisdiction under 28 U.S.C. §1332 because of diversity of citizenship, the plaintiff being a citizen of Colorado and the defendant a Missouri corporation with its principal place of business at St. Louis, Missouri.

On October 12, 1984, the district court granted petitioner's motion for summary judgment determining that life insurance coverage existed. Judgment was entered October 15, 1984 and amended November 2, 1984. The November 2 order was modified December 14, 1984. *See* pp. 9a, 12-14a, 16a, 17a, 18a and 19a, *infra*.

On respondent's appeal, the Tenth Circuit on January 12, 1988, entered an opinion reversing the district court's amended summary judgment and directing that judgment be entered in favor of the respondent. *See* p. 7a, *infra*.

A timely petition for rehearing was filed by petitioner on February 9, 1988. The Tenth Circuit denied the petition for rehearing on March 10, 1988. *See* p. 8a, *infra*.

On May 24, 1988, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including July 8, 1988.

The jurisdiction of this Court to review judgment of the Tenth Circuit is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

*United States Constitution, Amendment V — Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*United States Constitution, Amendment VII — Civil Trials*

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

*Fed. R. Civ. P. 56. Summary Judgment*

Due to the length of the provision, the pertinent text of Rule 56 is reprinted in the appendex hereto, p. 20a, *infra*.

## STATEMENT OF THE CASE

Upon removal of this action from the state court by respondent, the jurisdiction of the United States District Court was invoked under 28 U.S.C. §1332 because of diversity of citizenship, the petitioner being a citizen of Colorado and the defendant a citizen of Missouri.

Petitioner is the surviving wife of decedent Ronald James Burak who died on October 27, 1983 as the result of injuries sustained in an automobile accident as decedent was driving to work at Laramie, Wyoming from his Fort Collins, Colorado home. The complaint alleged that petitioner's decedent was insured under respondent's group life insurance policy for life and accidental death insurance coverage in the amount of $42,000 for each coverage. The complaint further alleged that respondent had breached its covenant of good faith and fair dealing by refusing to process any claim by or on behalf of petitioner. Petitioner sought recovery of monetary damages including coverages under the life and accidental death provisions of the insurance policy.

Respondent answered by denying that coverage was in effect on the decedent's date of death. Respondent petitioned the district court for removal of the action on the basis of diversity of citizenship under 28 U.S.C. §1332 and on the basis of federal question

jurisdiction pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001.

Petitioner demanded a jury trial. Because of the precarious financial condition of the petitioner and in the interest of judicial economy, petitioner filed an early motion for summary judgment on the "coverage" issue seeking a determination that the effective date of coverage pre-dated decedent's death.[1] The effective date of the policy was January 1, 1983. Petitioner's decedent was employed by the respondent on September 16, 1983. Decedent died on October 27, 1983.

The insurance policy provided that the "individual eligibility date" required active work on a full-time basis for one month and further provided that the "effective date of personal insurance" was on the date the employee was eligible. Petitioner contended that insurance coverage for decedent became effective October 17, 1983. Respondent contended that the effective date of insurance was November 1, 1983, four days after decedent's death. Respondent contended that the "effective date of personal insurance" was controlled by an endorsement which stated:

> The following provisions of the policy are changed as follows:
>
> 1) The "Effective Date of Personal Insurance" and Part 2) of the

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[1] Prior to commencement of the action, petitioner could not obtain any information from respondent's office in Laramie, Wyoming concerning the group policy. All information, such as it was, had to be obtained from the home office of respondent in St. Louis, Missouri, which was limited to a pamphlet entitled "Your Group Insurance Plan [for Monolith Portland Cement Company employees]", petitioner's Exhibit 2 in the district court, which was received by petitioner's counsel in January, 1984. Because of the denial of coverage and refusal to process a claim by respondent, the action was commenced on March 23, 1984. A copy of the document represented by respondent to be the actual policy which was held in the respondent's office in Glendale, California was identified to the petitioner's counsel by respondent's attorney on April 6, 1984. It was later obtained from respondent's office in California. Based on the apparent strength of obtaining summary judgment based solely on the so-called "actual" policy, petitioner elected to file her motion for summary judgment which was filed May 31, 1984. The idea behind proceeding with a motion for summary judgment was to resolve the coverage issue more quickly and limit discovery and expenses. An issue still to be litigated concerns what the true policy consists of and whether any information regarding coverage or policy terms was brought to decedent's attention.

"Effective Date of Dependent Insurance" are changed to provide that the insurance of an individual shall be effective on the earlier of:

a) the first day of the policy month which coincides with the day it would otherwise be effective, or

b) the first day of the policy month which next follows the day it would otherwise be effective.

Petitioner contended that the aforementioned endorsement was ambiguous and must be construed against the insurer and in favor of coverage, according to controlling California law.

Respondent filed a cross-motion for summary judgment on the coverage issue. The issue as thereby joined concerned only the ambiguity or non-ambiguity of the policy language as it pertained to the effective date of coverage. The cross-motions for summary judgment left unresolved all other litigable issues, fact questions and discovery concerning coverage, including the questions of whether the endorsement relied on by respondent was "conspicuous" which, if not, would render it unenforceable under applicable California law, and what information, if any, decedent received when he signed his enrollment card with respondent on October 4, 1983, concerning when coverage would take effect.

These and other issues were mooted by the trial court's order entered October 12, 1984, holding that the above-quoted endorsement was ambiguous and therefore to be construed against the respondent in favor of coverage on the effective date of coverage question.

The district court's order granting petitioner summary judgment allowed $42,000 under the life insurance provision and an additional $42,000 for accidental death. On October 15, 1984, the district court entered summary judgment in the amount of $84,000 plus interest. On November 2, 1984, the district court amended its October 12 order allowing judgment in favor of petitioner in the amount of $42,000, the coverage under the life insurance provision, and leaving the parties to litigate the applicability of the double indemnity accidental death provision in the state court. On December 14, 1984, the district court further amended its initial judgment of October 12 by modifying the November 2, 1984 order to reflect that the district court retained jurisdiction for deter-

mining the remaining issue, the applicability of double indemnity under the accidental death provision.

Trial on the accidental death provision was held on May 29, 1985 before the district court, petitioner having waived her jury demand as to the remaining issue of accidental death coverage only. Upon completion of the trial the district court entered judgment in favor of the respondent and against the petitioner by order dated May 29, 1985. On June 11, 1985, the district court amended its judgment to reflect that the petitioner be awarded $42,000 under the life insurance provision and that the claim for double indemnity was dismissed.

In due course, the parties filed cross-appeals with the United States Court of Appeals for the Tenth Circuit. Petitioner appealed the trial court's dismissal of her double indemnity accidental death claim and respondent appealed the grant of summary judgment to petitioner on the life insurance coverage effective date question.[2] The parties invoked the Tenth Circuit's jurisdiction under 28 U.S.C. §1291 to review "final decisions" of district courts.

The Tenth Circuit, applying a *de novo* standard of review, interpreted the key endorsement language as precluding coverage on the date of decedent's death.[3] Having concluded that summary judgment was improperly entered against respondent on the underlying coverage question, the court of appeals declined to address the double indemnity issue. The appellate court accordingly reversed and remanded to the district court. However, instead of remanding for trial on the issues which were mooted by the district court's grant of summary judgment, the appellate court directed the district court

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[2] In accordance with Fed. R. App. P. 28(h), petitioner (plaintiff in the district court) was designated as the appellant in the court of appeals. However, respondent was in reality an appellant as to the coverage issue.

[3] The court of appeals applied a test of "detailed scrutiny" to petitioner rather than subjecting the policy language to the rule required by applicable California law that if the policy language is ambiguous it must be construed against the insurer and in favor of coverage. According to California law, an exclusion in coverage must be stated in language which is plain and clear in the sense it is comprehensible to lay persons including the use of words which are part of the working vocabulary of average lay persons. *Ponder v. Blue Cross of Southern California*, 145 Cal. App. 3d 709, 193 Cal. Rptr. 632, 643 (Cal. Ct. App. 1983).

to vacate its amended judgment and "enter judgment in favor of the defendant." *See* p. 7a, *infra*.

Petitioner filed a timely petition for rehearing wherein she raised the constitutional deprivation caused by the Tenth Circuit's decision not to remand to the district court for a trial of the remaining issues which could establish insurance coverage. Petitioner pointed out that the effect of the Tenth Circuit's direction on remand was to grant summary judgment to an appellant. Petitioner sought remand to the district court for a retrial on the coverage and accidental death issues.

The Tenth Circuit, by order entered March 10, 1988, denied the petition for rehearing.

## REASONS FOR GRANTING THE WRIT

### I.

### The Tenth Circuit's Order Granting Summary Judgment to An Appellant Rather Than Remanding for Trial Where There Remain Genuine Litigable Issues of Material Fact Conflicts With a Prior Decision of This Court and Presents an Important Question of Federal Law Which Should Be Settled If It Is Not Already

The Tenth Circuit has established a dangerous precedent by denying a litigant a full trial on the merits concerning issues as to which the deprived party had no opportunity to present evidence before the trial court by granting summary judgment to an appellant instead of remanding for trial. This decision conflicts with this Court's holding in *Fountain v. Filson*, 336 U.S. 681 (1949) and with the reasoning underlying *Hormel v. Helvering*, 312 U.S. 552 (1941). Such a drastic decision sacrifices rules of fundamental justice and threatens to deprive future litigants of judicial consideration of legal theories not able to be presented in the trial court by virtue of the manner of development of the case. This threat to fundamental justice deserves this Court's attention. *See, e.g., United States v. Doe*, 465 U.S. 605, 610 (1984) (certiorari granted due to conflict with reasoning underlying prior decision); *Lugar v. Edmonson Oil Company*, 457 U.S. 922, 926 (1982) (certiorari granted due to conflict with prior decision).

The Tenth Circuit, in a footnote to its opinion, p. 7a, *infra.*, noted that petitioner had argued on appeal that public policy disallows insurance companies to mislead consumers through inconspicuous endorsements. The Tenth Circuit did not address the issue, however, as "[t]he record on appeal does not indicate that the district court was asked to make a factual determination of whether the endorsement at issue was inconspicuous so as to mislead consumers . . . ." *Id.* Rather than remanding to the trial court for determination of this and other issues not necessary to the cross-motions for summary judgment on the ambiguity question, the Tenth Circuit directed entry of judgment in favor of respondent. *See* p. 7a, *infra.*

The district court could not have been asked to make a factual determination on the conspicuousness of the endorsement as the case developed. The parties pursued early cross-motions for summary judgment to determine the effective date of coverage only. Factual issues concerning whether the endorsement was ever brought to the attention of the decedent and whether it was conspicuous were rendered moot by the trial court's grant of summary judgment to petitioner on the effective date question. Had the trial court denied petitioner summary judgment on the effective date of coverage question, that issue and all other issues, including conspicuousness of the endorsement, would have proceeded to trial. Had the endorsement been determined to be inconspicuous it could not have been enforced and the effective date of coverage would have been as provided in the policy thereby allowing coverage.

The *Fountain* Court held that an appellate court erred in depriving a litigant of an opportunity to dispute facts material to a claim by ordering summary judgment against that litigant when the litigant against whom summary judgment was ordered had no opportunity to present a defense before the trial court on a new issue which had not been raised as part of the motion for summary judgment in the district court. The Court explained:

> There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust.

336 U.S. at 683.

In the instant case there was no occasion for petitioner to litigate in the trial court the questions concerning whether the policy endorsement was brought to the decedent's attention and whether it was inconspicuous as against public policy. The cross-motions for summary judgment were strictly limited to construing the endorsement language to determine the effective date of coverage. Since the only issue considered by the trial court on the motions for summary judgment was the effective date of coverage question, the Tenth Circuit erred by not remanding to the trial court for a trial on the remaining issues.

The Court in *Hormel* announced that "[t]here may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." 312 U.S. at 557. The *Hormel* Court added, in words particularly relevant to the Tenth Circuit's refusal to remand for trial,

> [r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

*Id.*

The *Hormel* Court cited approvingly other cases which have been remanded because the lower courts failed to give consideration to a phase of the case involving legal theories not presented, including *United States v. Rio Grande Dam and Irrigation Company*, 184 U.S. 416, 423 (1902) (remanding for further development of the record). 312 U.S. at 558 and n.7.

Good judicial administration requires that this important issue be resolved in such a way that the case be remanded to the district court and that decision of the ultimate questions involved in this case be reserved until the record presents a more solid basis of complete findings following a trial. *See Kennedy v. Silas Mason Company*, 334 U.S. 249, 257 (1948).

The conflict between the instant case and the important

principles articulated in *Fountain* and *Hormel* presents an ideal opportunity for this Court to reaffirm an important principle of federal law. This principle is that an appellate court may not order summary judgment for an appellant where issues remain to be tried.

We submit that *Fountain*, having reversed the court of appeals for ordering summary judgment for the appellant, has settled this issue.[4] If the issue raised has not already been settled by this Court, this case presents an important question of federal law which should be settled by this Court. *See Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 507 (1982).

II.

The Tenth Circuit's Decision Conflicts With The Decisions of Other Federal Courts of Appeals on the Same Matter For Which There is Need for a Uniform Rule

Because of the "threat to the goal of uniformity of federal procedure posed by the decision below," *Hanna v. Plumer*, 380 U.S. 460, 463 (1965), this Court should review this case involving construction of the Federal Rules of Civil Procedure. *See Hickman v. Taylor*, 329 U.S. 495 (1947).

The decision below is in conflict with the decisions of numerous other federal courts of appeals. The Ninth Circuit Court of Appeals, for instance, has remanded for a full trial in a situation virtually indistinguishable from that presented by the instant case. *Smith v. United States*, 362 F.2d 366, 368 (9th Cir. 1966). That case involved a motion to dismiss which, because matters outside the record were submitted, was treated as a motion for summary judgment. During oral argument in the court of appeals there was a suggestion made that another possible legal theory existed apart from that raised in the motion. The court there stated that "[a] full

[4] Professor Moore, in his treatise on federal practice, believes that *Fountain* does not deny the existence of an appellate court to dispose of a case by reversing with directions to enter judgment for the appellant. 6 J. Moore, *Federal Practice*, Part 2, ¶56.27[2] (2d ed. 1987). However, even Moore recognizes that the power must be cautiously used to the end that the appellee is not deprived of a trial of genuine issues of material fact underlying her claim or defense. *Id.*

development of the facts pertaining to these and other circumstances" would make it possible to resolve the question raised in the motion with "considerably more assurance" than was possible on the record then before it, explaining,

> [a]s this case was presented in the district court it was not apparent that any such issue of fact was involved. As the case unfolded in this court, however, genuine issues of material fact, as noted above, have been revealed. Under these circumstances we think the proper course is to send the case back for a full trial.

*Id.* at 367, 368.

The Ninth Circuit dealt with this issue again in *Roberts v. Hollandsworth*, 582 F.2d 496 (9th Cir. 1978). That case reached the court of appeals on appeal from the grant of a summary judgment. Not until arguments on appeal did counsel advance another legal theory than that raised in the motion. The Ninth Circuit noted that the new legal theory could well provide a valid claim for relief and concluded that the trier of the facts, the court or a jury, had to pass on the issue of fact thereby created. *Id.* at 499. The court there mentioned its awareness of the rule that a federal appellate court does not generally consider an issue not passed upon by the lower court, but that the doctrine as set forth in *Hormel v. Helvering*, *supra* — that where justice might otherwise result, such an unraised issue will be considered — is equally well-recognized. 582 F.2d at 500. The Ninth Circuit held that a "substantial injustice" might result if it did not remand for clarification of the newly raised issue. *Id.*

Equally in conflict with the decision below is *Tomalewski v. State Farm Life Insurance Company*, 494 F.2d 882 (3d Cir. 1974). There the Third Circuit, faced with an appeal of cross-motions for summary judgment, held that if the pleadings present a genuine issue as to a material fact, there can be no valid summary judgment of the disputed facts. *Id.* at 884. The Third Circuit rejected an argument that a party by motion for summary judgment waives any right to assert a claim when an issue of fact is clearly presented by the pleadings. *Id.* at 885. It accordingly reversed the judgment and remanded for further proceedings in the district court. *Id.*

The Fifth Circuit is also in conflict with the decision below. In *Black Warrior Electric Membership Corporation v. Mississippi*

*Power Company*, 413 F.2d 1221, 1226 (5th Cir. 1969), the Fifth Circuit, recognizing that the district court had not reached a question not raised in a motion for summary judgment, remanded for further proceedings explaining that "[i]f this issue requires decision it is initially for the district court."

The extent of the inter-circuit conflict is made manifest by *M. Snower & Company v. United States*, 140 F.2d 367 (7th Cir. 1944), which involved cross-motions for summary judgment and judgment on the pleadings. The court of appeals concluded there was still a material issue of fact before the trial court after the motions had been made. Accordingly, the judgment for plaintiff entered by the trial court on its motion for summary judgment was reversed and the cause remanded for further proceedings. *Id.* at 371.

Only the Tenth Circuit has deprived a litigant of litigating material factual questions not necessary to nor raised in the motions for summary judgment heard in the trial court. The Tenth Circuit seeks justification for this deviation by noting that the record does not indicate that the district court was asked to make a factual determination of the issue first raised on appeal. *See* p. 7a, *infra*.

That rationale reflects a fundamental misunderstanding about the policy and purpose of summary judgment as embodied in Fed. R. Civ. P. 56. It is well-established that "the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). No matter how reasonable, a surmise that a party is unlikely to prevail at trial is not a sufficient basis for refusing her her day in court. *Robertson v. White*, 635 F. Supp. 851, 872 (W. D. Ark. 1986).

Relief by way of summary judgment is drastic, and should be applied with caution to the end that litigants will have a trial on all bona fide factual disputes. *Jones v. Nelson*, 484 F.2d 1165, 1168 (10th Cir. 1973); *Machinery Center, Inc. v. Anchor National Life Insurance Company*, 434 F.2d 1, 6 (10th Cir. 1970). Summary judgment is not to be entered unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances. *Ozark Milling Company, Inc. v. Allied Mills, Inc.*, 480 F.2d 1014, 1015 (8th Cir. 1973). Summary judgment

does not serve as a substitute for trial. *Redhouse v. Quality Ford Sales, Inc.*, 511 F.2d 230, 234 (10th Cir. 1975).

The Tenth Circuit's decision emasculates these fundamental principles of federal civil procedure and undermines predictability and confidence in federal jurisprudence. If allowed to stand, the Tenth Circuit's decision will subvert the goals of just, speedy and inexpensive determination of actions in the Tenth Circuit which goals are articulated in the rules of civil procedure. Litigants will be reluctant to test legal issues with early summary judgment motions if they are to be precluded from litigating other issues not necessary to be raised as a predicate to the motion. This uncertainty will no doubt frustrate federal practice which relies heavily on the mechanism of summary judgment for early disposition of cases and may cause litigation costs to rise sharply as litigants pursue costly discovery instead of seeking quick determinations on threshold legal issues.

The national impact of letting the lower court decision stand would be widespread confusion and encouragement of forum shopping. Cautious litigants will seek to file federal cases in those circuits which elevate concepts of fundamental justice over procedure. It is vital that the question presented be decided finally by this Court in order that there be a uniform rule on the point. *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962).

The requirements of due process of law as set forth in the Fifth Amendment to the United States Constitution, like the rules of civil procedure, demand uniformity in application. As stated by the Court in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " Fulfillment of this requirement is accomplished by providing the recipient timely and adequate notice detailing the reasons for the proposed deprivation and an effective opportunity to defend by confronting any adverse witnesses and by presenting one's own arguments and evidence orally. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

Petitioner here had no notice that the appellate court would deprive her of the opportunity to litigate remaining factual and legal issues should it reverse the district court's grant of summary judgment to her. It is beyond argument that she has been denied the opportunity to present her own arguments and evidence on the

remaining issues, including public policy considerations connected with the inconspicuousness of the insurance policy endorsement, which has deprived her of substantial life and accident insurance benefits.

Not only does the Tenth Circuit's decision deprive the petitioner of her constitutional rights; it also has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.[5]

In the words of Justice Stevens, "[a]s the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." *Florida v. Rodriquez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting); *accord, McNabb v. United States*, 318 U.S. 332, 341 (1943).

The result reached below is unduly harsh in its impact. This Court should grant certiorari to correct the injustice and insure that it is not repeated in a multitude of future cases. *See, e.g., Montoya v. Kennedy*, 366 U.S. 308, 309 (1961) (where certiorari was granted "in view of the apparent harshness of the result entailed"); *see also Southern Construction Company v. Pickard*, 371 U.S. 57, 60 (1962) (where certiorari was granted to consider the applicability of a federal rule of civil procedure in unusual circumstances).

The Tenth Circuit has created a confusing precedent, likely to disrupt the uniformity of federal civil procedure by undermining predictability and encouraging forum shopping. It is a precedent directly at odds with the decisions of numerous other circuits and this Court. Plenary consideration of the matter by this Court is essential.

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[5] 28 U.S.C. §2072 states in relevant part that "[t]he Supreme Court shall have the power to prescribe by general rules, . . . the practice and procedure of the . . . courts of appeals of the United States in civil actions. . . ." The section also provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

## III.

### The Decision Below Creates an Intra-Circuit Conflict Relating to a Recurring and Important Issue

The Tenth Circuit has previously dealt with this issue by stating that "[t]he rights of the parties should be determined after a full-fledged trial of the merits." *Eagle v. Louisiana and Southern Life Insurance Company*, 464 F.2d 607, 609 (10th Cir. 1972). In that case, like here, a widow brought suit to recover on a group life insurance policy for the death of her husband. Both sides moved for summary judgment. The court granted plaintiff's motion and denied that of defendant's. The opinion acknowledged that presentation of cross-motions for summary judgment does not concede the absence of a material issue of fact. *Id.* at 608; *accord, United States Trotting Association v. Chicago Downs Association, Inc.*, 665 F.2d 781, 785 (7th Cir. 1981) (stating that the filing of a cross-motion for summary judgment does not prevent a plaintiff from contending on appeal that there is a dispute as to material facts); *Case and Company, Inc. v. Board of Trade of the City of Chicago*, 523 F.2d 355, 360 (7th Cir. 1975) (holding that the filing of a cross-motion for summary judgment does not preclude a plaintiff from contending that summary judgment was inappropriate because there are certain disputed questions of fact); *Capital Temporaries, Inc. of Hartford v. Olsten Corporation*, 506 F.2d 658, 667 (2d Cir. 1974) (accepting plaintiff-appellant's argument that the fact that the plaintiff himself cross-moved for summary judgment does not bar his raising on appeal material issues of fact which could not be determined without a trial by jury).

The *Eagle* court, unlike the panel below, permitted the widow a full-fledged trial of the merits where a genuine controversy of a material fact concerning policy coverage existed. This irreconcilable conflict relates to a recurring and important issue concerning the power of an appellate court to order summary judgment be entered for the appellant, thus depriving the other party of her right to trial on remaining issues which, if litigated, could spell victory for the deprived party. Certiorari should be granted to resolve this intra-circuit conflict. *See, e.g., John Hancock Mutual Life Insurance*

*Company v. Bartels*, 308 U.S. 180, 181 (1939) (certiorari granted because of intra-circuit conflict and the importance of the question); *Dickinson v. Petroleum Conversion Corporation*, 338 U.S. 507, 508 (1950) (certiorari granted "because of this intracircuit conflict"); *Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (certiorari granted because of "split among the Circuits," one circuit being noted as having an intra-circuit conflict).

## CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that Question 2 is presented herein, not as a reason for granting certiorari, but because of the posture of this case this is the only opportunity for petitioner to seek review of the ultimate ruling of the Tenth Circuit directing entry of judgment against her. If the petitioner is correct in urging that the Tenth Circuit has improperly deprived her of the right to proceed to trial on the merits, the matter should be remanded to the district court for appropriate disposition, after a full development of the facts concerning insurance coverage. Indeed, in view of the conflict of the decision below with past decisions of this Court, the Court may wish to consider summary reversal.

Respectfully submitted,

SAMUEL LEE ANDERSON
323 South College Avenue,
Suite 3
Fort Collins, CO 80524
(303) 482-4011
*Counsel of Record*

KENT N. CAMPBELL
323 South College Avenue,
Suite 3
Fort Collins, CO 80524
(303) 482-4011
*Counsel for Petitioner*

APPENDIX

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*PUBLISH*

**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

FILED
United States Court of Appeals
Tenth Circuit

JAN 12 1988

ROBERT L. HOECKER
Clerk

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| PAMELA J. BURAK, | ) | |
| | ) | |
| *Plaintiff-Appellant/ Cross-Appellee,* | ) | |
| | ) | |
| *v.* | ) | Nos. 85-1970 |
| | ) | 85-1971 |
| GENERAL AMERICAN LIFE INSURANCE COMPANY, | ) | |
| | ) | |
| *Defendant-Appellee/ Cross-Appellant.* | ) | |

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Civil Action No. 84-K-782)

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Kent N. Campbell (Samuel L. Anderson with him on the briefs) of Anderson, Sommermeyer, Wick & Dow, Fort Collins, Colorado, for Plaintiff-Appellant/Cross-Appellee.

Donald M. Burkhardt (Charles H. Haines, Jr. with him on the briefs) of Grant, McHendrie, Haines and Crouse, Denver, Colorado, for Defendant-Appellee/Cross-Appellant.

Before McKAY and BALDOCK, Circuit Judges, and BROWN, District Judge.*

McKAY, Circuit Judge.

In this nonjury case, two issues are presented on appeal: (1) whether Ronald J. Burak was covered under a company group life insurance policy when he died, and if so, (2) what amount of death benefits are payable to the beneficiary.

I.

Ronald J. Burak began employment with Monolith Portland Cement Company (Monolith) on September 16, 1983. On October 4, 1983, Mr. Burak signed an enrollment card for coverage under a noncontributory group life insurance policy (Policy) issued to Monolith by defendant, General American Life Insurance Company. Mr. Burak named plaintiff, Pamela J. Burak, as the Policy's beneficiary. On October 27, 1983, Mr. Burak was pronounced dead at the scene of a single car collision with a bridge abutment. An autopsy revealed that Mr. Burak had suffered a nonsurvivable basilar skull fracture from the collision. The autopsy also revealed that Mr. Burak was having a myocardial infarction or "heart attack" when the collision occurred.

Plaintiff filed a claim with defendant for $42,000 in death benefits on the Policy and for an additional $42,000 in benefits pursuant to the accidental indemnity clause contained in the Policy. Defendant denied plaintiff's claim on the ground that Mr. Burak's death preceded the effective date of the Policy. Defendant also denied that the cause of death was accidental.

Plaintiff filed suit to collect the death and accidental death benefits in state district court, and defendant removed the suit to

* Honorable Wesley E. Brown, United States Senior District Judge for the District of Kansas, sitting by designation.

federal district court on the basis of diversity of citizenship. 28 U.S.C. §1332 (1982). On October 12, 1984, the district court granted summary judgment for plaintiff. The district court ruled that the provision establishing the effective date of the Policy (Effective Date Provision) was ambiguous and allowed an interpretation that coverage existed at Mr. Burak's death. The court also ruled that Mr. Burak's death resulted from the accident and that plaintiff was entitled to an additional payment under the Policy's double indemnity clause.

Upon reconsideration, the district court amended the October 12th order by requiring the parties to litigate the benefits granted under the double indemnity clause. After hearing evidence, the district court dismissed plaintiff's double indemnity claim. Final Amended Judgment was entered on June 11, 1985, *nunc pro tunc* May 29, 1985. This judgment awarded plaintiff $42,000 in death benefits plus interest, but denied the double indemnity benefits.

Plaintiff now appeals the district court's denial of her double indemnity claim. Defendant cross-appeals the district court's summary judgment ruling that the Policy was effective at Mr. Burak's death. Because the issue of whether Mr. Burak was covered by the Policy is determinative, we need not reach the double indemnity claim.

II.

In considering defendant's challenge of the summary judgment, we apply a *de novo* standard of review. *Wheeler v. Hurdman*, 825 F.2d 257, 260 (10th Cir.), *cert. denied*, _____ *U.S.* _____ *(1987); Hydro Conduit Corp. v. American-First Title & Trust Co.*, 808 F.2d 712, 714 (10th Cir. 1986). Summary judgment was proper if, as a matter of law, Mr. Burak was covered under the Policy when he died. Coverage under the Policy becomes effective when the individual belongs to an eligible class, the individual completes the one-month waiting period, and the Policy is activated by the Effective Date Provision. *See* Record, vol. 1, at 15. The parties do not contest that Mr. Burak satisfied the eligibility class and waiting period criteria. The sole question then is to determine Mr. Burak's effective date under the Policy.

The Policy provides that its provisions are to be governed by California law. Record, vol. 1, at 37. The basic Policy is a standard form insurance contract issued by defendant. The Effective Date Provision states that "personal insurance shall be made effective on the date the employee is eligible." *Id.* at 15. The individual eligibility date could be established when an employee completed full-time work for the required waiting period — one month — or at "the effective date of this [P]olicy, if later." *Id.*

The face of the Policy states that "[t]he first premium is due on the effective date. Future premiums are due each month on the first of the month. Policy months *after the first* [month] begin on the first of the month." *Id.* at 14 (emphasis added). Thus, it appears at first reading that Mr. Burak should have been eligible when his one-month waiting period ended on October 16th, and that his insurance should have become effective on that date; his first premium would have been due on October 16th with subsequent premiums payable on the first of each month thereafter.

However, as is true with most form contracts, a company choosing a policy may also select various endorsements that modify particular policy provisions. Monolith's Policy contains not only the standard Effective Date Provision but also an endorsement. The endorsement provides:

> that the insurance of an individual shall be effective on the earlier of:
>
> a) the first day of the policy month which coincides with the day it would otherwise be effective, or
>
> b) the first day of the policy month which next follows the day it would otherwise be effective.

Record, vol. 1, at 16. The parties agree that "the day it would otherwise be effective" is the end of the waiting period or October 16th in Mr. Burak's case. However, the effect that this date has in establishing "the first day of the policy month," or effective date, remains in conflict.

Plaintiff asserts that the Policy could have easily been revised to incorporate the endorsement language into the Effective Date Provision. Since this was not done, plaintiff claims that the " 'original policy' and the 'endorsement' appear to be mutually effective at the same time, thereby constituting an ambiguity" that should be

resolved in her favor. Plaintiff-Appellant's Reply Brief at 7; *see Beaumont-Gribin-Von Dyl Management Co. v. California Union Ins. Co.*, 63 Cal. App. 3d 617, 622, 134 Cal. Rptr. 25, 27 (1976) (ambiguities are to be construed against the drafter).

Plaintiff's argument strikes upon a serious problem in the insurance industry. Insurance providers routinely issue standard policies and when those policies need to be amended, the insurer does not rewrite the appropriate provisions but merely attaches an endorsement to the standard policy. The result of this practice is that the body of the policy may offer a type of coverage that is expressly taken away by a subsequent endorsement. In addition, insurance companies frequently fail to calculate how the endorsement may affect nonreferenced sections of the policy.

Despite their great potential for misleading consumers, the use of endorsements is allowed and accepted. Moreover, under California law, an endorsement to a policy becomes part of the policy and "if there is a conflict in meaning between an endorsement and the body of the policy, the endorsement controls." *Continental Casualty Co. v. Phoenix Constr. Co.*, 46 Cal. 2d 423, 431, 296 P.2d 801, 805 (1956); *Southwestern Funding Corp. v. Motors Ins. Corp.*, 59 Cal. 2d 91, ____, 28 Cal. Rptr. 161, 162, 378 P.2d 361, 362 (1963). Therefore, based upon California law, an endorsement which conflicts or varies from the standard policy does not create an ambiguity in terms, but must instead control. Accordingly, the effective date of Mr. Burak's Policy is governed primarily by the language of the Policy's endorsement, and to the degree that the endorsement conflicts with or varies from the standard Policy, the endorsement must stand. The terms of the endorsement provide the key to whether Mr. Burak was covered by the Policy at the time of his death.

Defendant contends that the endorsement means that, if the policy holder completes his one-month waiting period on the first day of a calendar month, the insurance coverage begins that day. If, however, he completes his waiting period on the second day of the month or on any day thereafter in the month, he must wait until the first day of the next calendar month before coverage begins. Since Mr. Burak ended his waiting period on October 16, 1983, a day which does not coincide with the first day of the month,

subparagraph (a) would not apply. Thus, Mr. Burak's effective date would be controlled by subparagraph (b) and would be the "first day of the policy month which next follows," or November 1, 1983.

Plaintiff maintains that the endorsement can be interpreted in at least two other ways. First, plaintiff argues that the policy month may not be the same as the calendar month, but could be interpreted to mean the day the waiting period ended, or October 16, 1983. Thus, under this interpretation of subparagraph (a), the "first day of the policy month" and the "day it would otherwise be effective" would coincide on October 16, 1983, and make the policy effective. Second, even if the policy month is synonymous with a calendar month, plaintiff suggests that subparagraph (a) can also be understood to mean that the Policy is effective on the first day of the particular month in which the individual satisfies his waiting period. Thus, since the first day of the policy month or calendar month that coincided with October 16, 1983, was October 1, 1983, the Policy could have become effective the first day of October.

Plaintiff also contends that subparagraph (b) "can be read as either November 1, 1983 (the first day of the policy month which next follows the day it would be effective), or as October 17, 1983 (if 'policy month' is not read to be the same as a calendar month . . .)." Plaintiff-Appellant's Reply Brief at 14. Therefore, under either of the alternative interpretations which plaintiff proposes, subparagraph (a) would always establish an effective date before that established by subparagraph (b).

Having reviewed plaintiff's and defendant's interpretations of the endorsement, the Policy, and the record; we find that plaintiff's interpretations cannot withstand detailed scrutiny. Plaintiff's first interpretation requires the policy months to be other than calendar months, when the face of the Policy expressly provides that policy months are to "begin on the first of the month." Record, vol. 1, at 37. Plaintiff's second interpretation inappropriately uses the word "coincide" to modify policy month rather than "the first day of the policy month." Even if we did not find that plaintiff's interpretations strained the language of the endorsement, they do not give effect to each of the subparagraphs. Thus, plaintiff's interpretations of the endorsement effectively read the "earlier of" language and subparagraph (b) out of the contract.

While California law requires us to interpret the policy to indemnify the plaintiff's losses if "semantically permissible, *Crane v. State Farm Fire and Casualty Co.*, 5 Cal. 3d 112, 115, 95 Cal. Rptr. 513, 514, 485 P.2d 1129, 1130 (1971), we are not allowed to achieve this result by writing out parts of the contract. We are bound to give each subsection effect if possible. *Holz Rubber Co. v. American Star Ins. Co.*, 14 Cal. 3d 45, 56, 120 Cal. Rptr. 415, 421, 533 P.2d 1055, 1061 (1975) ("An insurance policy, like any other contract, must be construed as an entirety, with each clause lending meaning to the other."); *Jurd v. Pacific Indemnity Co.*, 57 Cal. 2d. 699, ____, 21 Cal. Rptr. 793, 795, 371 P.2d 569, 571 (1962); *see* Cal. Civ. Code, §1641 (Deering 1987) ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."); *see also Harborside Refrigerated Services, Inc. v. IARW Ins. Co.*, 759 F.2d 829, 830 (11th Cir. 1985) ("If possible, the court must adopt a construction which will give effect to the total instrument and its provisions."). The endorsment is poorly written and obscure. However, because plaintiff's interpretations of the endorsement fail to give the "earlier of" language and subparagraph (b) effect, we reject plaintiff's interpretations in favor of the one proposed by defendant which does give effect to the entire endorsement. We conclude that summary judgment was improperly entered against defendant. Mr. Burak was not covered under the Policy and, accordingly, plaintiff's appeal as to her right to double indemnity benefits is dismissed.*

REVERSED and REMANDED to the district court with directions to vacate its amended judgment and enter judgment in favor of the defendant.

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* We note that the plaintiff makes reference to a public policy argument that insurance companies should not be allowed to hold out coverage in the policy and then limit the coverage through exceptions or endorsements that are hidden in the fine print of the contract. Plaintiffs-Appellant's Reply Brief at 11. The record on appeal does not indicate that the district court was asked to make a factual determination of whether the endorsement at issue was inconspicuous so as to mislead consumers and thus violate public policy. Accordingly, we do not reach the issue.

*MARCH TERM - March 10, 1988*

Before Honorable Monroe G. McKay, Honorable Bobby R. Baldock, Circuit Judges, and Honorable Wesley E. Brown, District Judge*

| | | |
|---|---|---|
| PAMELA J. BURAK, | ) | |
| | ) | |
| *Plaintiff-Appellant, Cross-Appellee,* | ) | |
| | ) | |
| *v.* | ) | Nos. 85-1970 and 85-1971 |
| | ) | |
| GENERAL AMERICAN LIFE INSURANCE COMPANY, | ) | |
| | ) | |
| *Defendant-Appellee, Cross-Appellant.* | ) | |

The petition for rehearing filed in the captioned cause by plaintiff-appellant/cross-appellee Pamela J. Burak is denied.

ROBERT L. HOECKER, Clerk

*/s/ Patrick Fisher*
Chief Deputy Clerk

* of the United States District Court for the District of Kansas, sitting by designation.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

CIVIL ACTION NO. 84-K-782

PAMELA J. BURAK,

*Plaintiff,*

*vs.*

GENERAL AMERICAN LIFE INSURANCE COMPANY,

*Defendant.*

FILED
United States District Court
Denver, Colorado

10 12 1984

JAMES R. MANSPEAKER
Clerk

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ORDER

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KANE, J.

This action was originally brought in the District Court of Larimer County, Colorado, alleging that defendant, General American Insurance Company, has breached its covenant of good faith and fair dealing by refusing to process any claim by or on behalf of plaintiff. The complaint also alleges that plaintiff is entitled to recover punitive damages under the provisions of Colo. Rev. Stat. §13-21-102 (1973). Plaintiff also seeks to recover her costs and attorney fees.

The parties are before me on defendant's petition for removal from the Larimer County District Court, plaintiff's motion to remand the action, and cross motions for summary judgment on the matters averred in the complaint. All issues have been briefed by the parties.

Plaintiff is the surviving spouse of Ronald J. Burak, who died October 27, 1983, as a result of injuries sustained in an auto accident which occurred October 27, 1983, while driving on U.S. Highway 287 near milepost 355, northwest of Fort Collins, Colorado. At the time of death, the deceased was employed by Monolith

Portland Cement Company, a California corporation doing business in Laramie, Wyoming where Burak was employed. Burak began employment with Monolith September 16, 1983. As an employee, Burak was entitled to benefit from a group insurance plan that was offered by Monolith to its employees. Availing himself of this opportunity, Burak executed a General American Group Coverage Certification Form #4563, an enrollment card, on October 4, 1983. General American was the insurance company chosen by Monolith, the policy holder, to administer the group insurance plan. Burak took out life insurance with coverage of $42,000, naming plaintiff as the beneficiary of the policy. Upon notification to General American in a letter dated December 27, 1983 by plaintiff's counsel, to the effect that Mrs. Burak intended to file a claim to collect the proceeds of the policy, General American responded, in a letter to plaintiff's counsel, that it was the position of General American that the policy in question was not in effect at the time of Burak's death; that the effective date of the policy would have been November 1, 1983, four days after decedent's death. Plaintiff alleges that the effective date of the policy was October 16, 1983, the completion of the waiting period under the terms of the policy or, in the alternative, October 1, 1983; that the language in the policy lends itself to this interpretation, and that the court should construe the policy in favor of plaintiff.

*PETITION FOR REMOVAL AND MOTION TO REMAND*

General American has petitioned the court to remove this action from the Larimer County District Court to the United States District Court under the provisions of Title 28 U.S.C. §1441 and 1446, and Rule 81 (d) of the Federal Rules of Civil Procedure. Defendant's petition was accompanied by a bond with sufficient surety in the sum of $1,000 to cover costs and disbursements incurred, should I determine that this action cannot be properly removed.

As grounds for removal, General American asserts that this court has jurisdiction under Title 28 U.S.C. §1332 because there exists complete diversity of citizenship; that plaintiff is a resident of Colorado and defendant corporation is a corporate resident of Missouri, with its principal place of business in St. Louis, Missouri

for jurisdictional purposes. Defendant has submitted a certificate of corporate good standing, issued by the Secretary of State of Missouri, which reflects that General American was incorporated under the laws of Missouri in June, 1933. The amount in controversy exceeds $10,000, the $42,000 policy amount. Also, as grounds for removal, defendant asserts that a federal question is presented inasmuch as plaintiff's claims are governed by the terms of the Employee Retirement Income Security Act (ERISA), Title 29 U.S.C. §1001 *et seq*. The ERISA contention relates to plaintiff's punitive damages claim.

Plaintiff moves for an order remanding this action to the Laramie [*sic*] County District Court on the following grounds: (1) diversity of citizenship does not exist between the parties, and (2) no federal question is presented.

In a petition for removal, the burden falls squarely on the removing party to establish its right to a federal forum by competent proof. *See R.G. Barry Corporation v. Mushroom Makers, Incorporated*, 612 F.2d 651, 655 (2d Cir. 1979). Plaintiff argues that diversity does not exist because General American is a mutual insurance company, which is a cooperative enterprise in which its members constitute both the insurer and the insured; that the beneficial ownership of the profits and surplus of a mutual insurance company inure to the policyholders. Plaintiff reasons that since the policyholder is both the insurer and the insured, each member of General American is possessed with citizenship of each state in which the business of General American is conducted. Therefore, according to plaintiff, diversity is destroyed since defendant, plaintiff, and Monolith (the policyholder) are citizens of Colorado. The metaphysical permutations of this argument are almost overwhelming. I cannot agree with plaintiff; it is the domicile of the corporation which is controlling for diversity purposes, and not that of the shareholders. *See Puerto Rico v. Russell & Company*, 288 U.S. 476, 479, 53 S.Ct. 447, 77 L.Ed. 903 (1933). Therefore, diversity of citizenship between the parties does exist for juridictional purposes under 28 U.S.C. §1332. I need not address the ERISA federal question contention at this time with respect to the jurisdictional requirements. Defendant has met its burden.

## *CROSS MOTIONS FOR SUMMARY JUDGMENT*

It is well established that summary judgment can be granted only where there is no genuine issue of material fact. *Securities & Exchange Commission v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980). The same rule applies in cross motions for summary judgment. *Buell Cabinet Company, Inc.*, 608 F.2d 431, 433 (10th Cir. 1979). The standards to be applied in deciding cross motions are the same as those applied when only one party has filed a summary judgment motion. *Selected Risks Insurance Company v. Schwabenbauer*, 540 F.Supp. 22, 24 (E.D. Pa. 1982). The mere fact that inherently contradictory claims have been made does not constitute an agreement that if one is rejected the other is necessarily justified. *Id.*

General American denied plaintiff's claim, as beneficiary under decedent's policy, on the basis that decedent was not covered under the terms of the policy at the time of his death, October 27, 1983; that the "effective date" of coverage would have been November 1, 1983. The language contained in the subject policy that sets forth the ambit of coverage for an insured is at the core of this dispute. General American argues that the language which grants coverage is unambiguous; plaintiff argues it is not; that the disputed coverage provision is capable of an interpretation to the effect that decedent's coverage took effect as of October 16, 1983, one month after decedent was hired by Monolith.

The policy states that it shall be governed by California law. On page thirteen of the policy under the heading of "General Provisions" and "Entire Contract" it is stated in the first paragraph that the subject policy represents the entire contract between the parties. Under California law, I must determine whether the language in the disputed provision is ambiguous as a matter of law. *See United States v. Haas and Haynie Corporation*, 577 F.2d 568, 572 (9th Cir. 1978) (citations omitted). If the disputed coverage provision is ambiguous, the insurance contract shall be construed against the party who prepared it. *See Beaumont-Gribin-Von Dyl Management Company v. California Union Insurance Company*, 63 Cal. App. 3d 617, 134 Cal. Rptr. 25, 27 (2d Dist. 1977); *Previews, Incorporated v. California Union Insurance Company*, 640 F.2d 1026, 1029 (9th Cir. 1981). This rule applies to insurance companies

with special force, and where uncertain language is used, any reasonable doubt will be resolved against the insurance company, whether the doubt relates to the extent or fact of coverage (as in this instance), the peril insured against, the amount of liability, or other operative provisions. *Beaumont, supra,* at 27.

The conditions of effective policy coverage of the subject policy are set forth as follows:

> The 'Effective Date of Personal Insurance' to provide that insurance of an individual shall be effective on the earlier of a) the first day of the policy month which coincides with the day it would otherwise be effective, or b) the first day of the policy month which next follows the day it would be effective.

Decedent was employed by Monolith, the group policyholder, on September 16, 1983, and died October 27, 1983. Decedent signed an enrollment card as an employee of Monolith on October 4, 1983, and completed his one month eligibility waiting period October 16, 1983. Pursuant to the above provision, the insurance was to be effective on "the first day of the policy month which coincides with the day it would otherwise be effective . . ." Given the completion by decedent of the thirty day waiting period as of October 16, 1983, the policy would "otherwise" have been effective on that date. The first day of that "policy month" (October) which coincides with that day, October 16, is October 16. I find that the policy coverage provision permits such an interpretation and that October 16 was earlier than November 1. Therefore, section "b" of the provision yields. Section "b" defines the effective date of the policy as "the first day of the policy month which next follows the day it would otherwise be effective." Thus, this could be read as either November 1, (the first day of the policy month which next follows), or as October 16, (which is "the first day . . . which next follows the day it would otherwise be effective.").

General American contends that the first page of the policy states that "policy months after the first [policy month] begin on the first day of the month," and that this language mandates that decedent's policy as having an effective date of either October 1 or November 1, and nothing in between. If this language were standing alone, that result would follow. But an insurance policy must be read in its entirety. In reading the policy in its entirety, I conclude

that the policy coverage effective date provision and the related provision concerning policy months, which must necessarily be read in conjunction with the effective date language, are ambiguous and open to several interpretations. Clearly, one reasonable interpretation of the cryptic provision presents the effective date of October 1. I construe the ambiguous language against General American which drafted the policy, and in favor of the plaintiff.

*ERISA*

Plaintiff seeks punitive damages. Defendant argues that punitive damages are not allowed because the Employees Retirement Income Security Act, Title 29 U.S.C. section 1001 *et seq.*, according to defendant, preempts state law actions and remedies that which otherwise might be available.

I have already found that diversity of citizenship existed between the parties for jurisdictional purposes. I reserved discussion of ERISA earlier in this order. I now find and conclude that General American's assertion that ERISA preempts state law in this action is unpersuasive. It is well established that ERISA was intended by Congress to preempt the entire field of employee benefit plan regulation. *See Lederman v. Pacific Mutual Life Insurance Company*, 484 F.Supp. 1020, 1022 (C.D. Cal. 1980). This action does not, however, attack in any manner the integrity or administration of the group insurance plan that Monolith provided for its employees; rather, the essence of this action is simply to pursue a claim for the proceeds plaintiff asserts is due her as a beneficiary of the policy in question. There is no basis for the conclusion that Congress found it necessary or appropriate to interfere with the substantial regulation of insurance companies operating in California, and that every claim against an insurance company under its group insurance plan should be litigated in federal court with exclusive ERISA remedies. *Id.* ERISA is not controlling here with respect to plaintiff's punitive claim.

Under California law, punitive damages may be awarded where it can be shown that defendant is guilty of oppression, fraud and malice. Defendant must act with the intent to vex, injure or annoy, or with a conscious disregard of plaintiff's rights. *See Silberg v.*

*California Life Insurance Company*, 11 Cal. App. 3d 465, 113 Cal. Rptr. 711, 718, 521 P.2d 1103 (1974). Even where if General American violated its duty of good faith and fair dealing, as alleged here, such does not necessarily establish that it acted with the requisite intent to injure plaintiff. *Id.* at 718. There is no evidence that General American acted with malice in refusing to process plaintiff's claim. Therefore punitive damages under Cal. [Civil] Code section 3294 are disallowed.

## *ATTORNEY FEES*

Plaintiff seeks to recover attorney fees, costs, and expenses arising from this action. Absent contractual or statutory authorization, the general rule is that attorney fees are not recoverable either as damages or costs. *See Mustachio v. Ohio Farmers Insurance Company*, 44 Cal. App. 3d 358, 118 Cal. Rptr. 581, 584 (2d Dist. 1975).

Plaintiff has alleged that General American violated its duty of good faith and fair dealing by refusing to pay the proceeds of the policy to plaintiff. Under California law, in every insurance contract there is an implied covenant that requires the insurer to deal in good faith and fairly in handling the insured's claim against it. This duty is imposed by law and does not arise from the terms of the contract. *See Richardson v. Employers Liability Assurance Company*, 25 Cal. App. 3d 232, 102 Cal. Rptr. 547, 552 (1972). When an insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. *Mustachio, supra*, 118 Cal. Rptr. 584. Where the insurer's tortious conduct makes it reasonable for the insured to seek protection of counsel, the insurer is responsible for that item of damages. *Id.* But every decision denying benefits is not evidence of bad faith. *See Mason v. Mercury Casualty Company*, 64 Cal. App. 3d 471, 134 Cal. Rptr. 545, 547-48 (1976). I earlier found that the disputed provision was susceptible of varied interpretations. I conclude that General American simply was pursuing its own economic interests in asserting its legal rights and defenses. It did not act unreasonably or in bad faith in denying the claim of plaintiff-beneficiary. No malice is shown here, just sloppy draftsmanship. Based on the foregoing, I deny plaintiff's

request for attorney fees. Since plaintiff has prevailed on her main claim, she is entitled to recover costs.

*THE POLICY AMOUNT*

The first page of the #4563 policy states that it is a life and accidental death and dismemberment insurance coverage policy. On the enrollment card signed by decedent, the insurance coverage is listed at $42,000. Under the "Accidental Death" provision, it reads in part on page six of the policy:

> 1) if injury results in loss of life, the amount of insurance in effect on the date of injury will be payable to the beneficiary. The beneficiary is the same as under the Life Insurance unless the insured individual names a separate beneficiary.

I find that Ronald James Burak died as a result of injuries he received in an auto accident October 27, 1983, and plaintiff is therefore entitled, as beneficiary of the life insurance policy, to recover $42,000 under the life insurance and an additional $42,000 for accidental death. The $42,000 amount recoverable under the accidental death provision is derived from the provision itself that the amount of insurance in effect on the date of decedent's death was $42,000. It is therefore

ORDERED that defendant's motion for summary judgment is denied; it is further

ORDERED that plaintiff's motion for summary judgment is granted; it is further

ORDERED that plaintiff shall have and recover from defendant her costs; it is further

ORDERED that judgment shall enter against defendant and for plaintiff in the amount of $84,000, plus interest at the legal rate from the date of filing of the complaint.

DATED at Denver, Colorado this 12th day of October, 1984.

*/s/ John L. Kane, Jr.*
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 84-K-782

PAMELA J. BURAK,

*Plaintiff,*

*vs.*

GENERAL AMERICAN LIFE INSURANCE COMPANY,

*Defendant.*

FILED
United States District Court
Denver, Colorado

OCT 15 1984

JAMES R. MANSPEAKER
Clerk

---

JUDGMENT

---

PURSUANT TO and in accordance with the Order entered by the Honorable John L. Kane, Jr., United States District Court Judge, on October 12, 1984, it is

ORDERED AND ADJUDGED that summary judgment is hereby entered for the plaintiff, Pamela Burak, and against the defendant General American Life Insurance Company in the amount of $84,000.00, plus interest at the legal rate of 11.36% from the date of the filing of the complaint. It is

FURTHER ORDERED that the plaintiff shall have her costs upon the filing of a Bill of Costs with the Clerk of the Court within ten days of the entry of this judgment.

DATED at Denver, Colorado this 15th day of October, 1984.

FOR THE COURT:

JAMES R. MANSPEAKER, Clerk

By: */s/ Stephen P. Ehrlich*
Stephen P. Ehrlich, Chief
Deputy

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 84-K-782

PAMELA J. BURAK,

*Plaintiff,*

*vs.*

GENERAL AMERICAN LIFE INSURANCE COMPANY,

*Defendant.*

FILED
United States District Court
Denver, Colorado

NOV 2 1984

JAMES R. MANSPEAKER
Clerk

---

AMENDED ORDER

---

The motion of defendant General American to this court for reconsideration of the Order of October 12, 1984 or, in the alternative, for a motion to alter the judgment to reflect no determination of the applicability of the double indemnity provision under the #4563 policy; it is

ORDERED that the judgment is modified, without prejudice to the parties to litigate the applicability of the double indemnity provision in the state court, to reflect that judgment shall enter for plaintiff and against defendant in the amount of $42,000, the coverage under the life insurance provision under the policy, plus costs, and interest at the legal rate from the date of the filing of the complaint.

DATED at Denver, Colorado this 2nd day of November, 1984.

*/s/ John L. Kane, Jr.*
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Case No. 84-K-782

PAMELA J. BURAK,

*Plaintiff,*

*vs.*

GENERAL AMERICAN LIFE
INSURANCE COMPANY,

*Defendant.*

---

MINUTE ORDER — JUDGE KANE

---

Summary judgment as to all parties and claims was entered October 12, 1984 in the above captioned matter. An order entered November 2, 1984 modified the initial judgment to reflect that the issue of the applicability of double indemnity under the accidental death provision of the policy was left undetermined, and that the parties could litigate that issue in the state court. The initial judgment of October 12 is deemed not final as to all parties and claims; that the November 2 order is modified to reflect that partial summary judgment is entered on the issue of the construction of the policy; and that the court retains jurisdiction for the purpose of determining the only remaining issue, the applicability of double indemnity under the accidental death provision, which shall be determined by a trial on the merits, which is set for May 31, 1985 at 9:00 AM at the United States Courthouse for the District of Colorado, Room C200. The parties shall submit a pretrial order at least thirty days prior to the trial date. Defendant's motion for reconsideration or for alternative relief is Denied.

Mary Clark, Secretary DATED: December 14, 1984

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(2)

Supreme Court, U.S.
FILED
JUL 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-2112

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PAMELA J. BURAK, PETITIONER,

V.

GENERAL AMERICAN LIFE INSURANCE COMPANY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Grant, McHendrie, Haines and
Crouse
Professional Corporation
By: Donald M. Burkhardt
1700 Lincoln Street, Suite 3000
Denver, Colorado 80203-1086
(303) 825-5111

Counsel of Record for the
Respondent

## QUESTION PRESENTED

Whether a federal appeals court denied petitioner her constitutional rights to due process and jury trial by reversing the lower court's judgment for petitioner and directing entry of judgment in favor of respondent and not remanding for trial where no genuine issues of material fact under Fed. R. Civ. P. 56 were raised before the district court.

## TABLE OF CONTENTS


Page

QUESTION PRESENTED..... i
TABLE OF AUTHORITIES.....iii
REVISED STATEMENT OF THE CASE.....vi
REASONS FOR DENYING THE WRIT..... 1

I. The Tenth Circuit Order Directing Entry Of Judgment For Respondent Has Not Denied Petitioner A Full Trial On The Merits Concerning Issues As To Which She Had Every Opportunity To Present Evidence Before The District Court And Does Not Conflict With A Prior Decision Of This Court..... 3

II. The Tenth Circuit Decision Does Not Conflict With The Decisions Of Other Federal Courts Of Appeal On The Same Matter.....13

III. The Decision Below Does Not Create An Intra-Circuit Conflict On The Same Issue.....19

CONCLUSION.....21

## TABLE OF AUTHORITIES

CASES — PAGE

UNITED STATES SUPREME COURT DECISIONS:

Fountain v. Filson, 336 U.S. 681, 69 S. Ct. 754, 93 L.ed. 971 (1949).....6, 7

Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719, 85 L.ed. 1040, (1941).....6, 8, 9

Kern County Land Company v. Occidental Petroleum Corporation, 411 U.S. 582, 93 S. Ct. 1736, 36 L.ed.2 503, (1973).....10

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 91 S. Ct. 1652, 36 L.ed.2 318, (1973).....10

United States v. Mitchell, 403 U.S. 190, 91 S. Ct. 1763, 29 L.ed.2 406 (1971).....10

CIRCUIT COURTS OF APPEALS DECISIONS

Black Warrior Electric Membership Corporation v. Mississippi Power Company, 413 F.2d 1221 (5th Cir. 1969).....17

Blau v. Del Monte Corporation, 748 F.2d 1348 (9th Cir. 1984).....12

Calamia v. Spivey, 632 F. 2d 1235 (5th Cir. 1980).....12

Eagle v. Louisiana and Southern Life Insurance Co., 464 F.2d 607 (10th Cir. 1972).....19

International Longshoremens & Warehousemens Union v. Kuntz, 334 F.2d 165 (9th Cir. 1964).....11

M. Snower & Co. v. United States, 140 F.2d 367 (7th Cir. 1944).....17, 18

Roberts v. Hollandsworth, 582 F.2d 496 (9th Cir. 1978.....13, 14

Sayre v. City of Cleveland, 493 F.2d 64 (6th Cir. 1974).....10

Smith v. United States, 362 F.2d 366 (9th Cir. 1966).....13, 14

Solinger v. A&M Records, Inc., 586 F.2d 1304 (9th Cir. 1978).....20

Stein v. Oshinsky, 348 F.2d 999 (2nd Cir. 1965).....10

Tomalewski v. State Farm Life Insurance Company, 494 F.2d 882 (3rd Cir. 1974).....15

Wardle v. Central States Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980).....12

**UNITED STATES DISTRICT COURT DECISION**

Gilliken v. Hughes, 609 F. Supp. 178 (D. Del. 1985).....12

**STATUTE**

29 U.S.C. 1001.....12

**RULES**

Fed R. Civ. P. 56.....i, 7

**MISCELLANEOUS**

6 J. Moore, Federal Practice, Part 2, ¶56.27[2] (2d ed. 1987).....11

10 C. Wright, Federal Practice and Procedure, Section 2716 (2d ed. 1983).....11

10 C. Wright, Federal Practice and Procedure, Section 2714 (2d ed. 1983).....11

## REVISED STATEMENT OF CASE

The petitioner's statement of the case requires some clarification. The statement that Ronald James Burak died as the result of an automobile accident is incorrect. As evidenced by the district court's dismissal of the double indemnity claim, his death was not due to an accident. Next, the petitioner waived her right to a jury trial in the May 9, 1985 pretrial order. Lastly, the purported background information, tactics, and strategy of petitioner's counsel for proceeding in the manner he did as outlined in footnote 1 on page 4 of the petition is not part of the record on appeal and, therefore, cannot be considered by this Court. The case was decided on the issues that the petitioner herself framed in the summary judgment proceed-

ings rather than those she would now like to raise for the first time on appeal.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

---

PAMELA J. BURAK, Petitioner,

V.

GENERAL AMERICAN LIFE INSURANCE COMPANY, Respondent.

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

On June 20, 1988, the respondent received the petitioner's petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in the instant proceeding. Petitioner contends that a writ of certiorari should be granted for the following reasons: (1) the Tenth Circuit has raised an important question of federal law by effectively granting summary judgment in favor of respondent even though genuine issues of

material fact remain for resolution by the district court; (2) the decision of the Tenth Circuit directing the district court to vacate its amended judgment and enter judgment in favor of the defendant conflicts with decisions of other federal courts of appeal for which the Supreme Court should issue a uniform rule; and (3) the decision creates a conflict with a prior decision of the Tenth Circuit.

For the following reasons, respondent disagrees with the above contentions and, therefore, opposes the petition for a writ of certiorari to review the judgment of the appellate court. In short, there are neither special nor important reasons for review of the Tenth Circuit opinion on writ of certiorari. Sup. Ct. R. 17.1.

I.

The Tenth Circuit Order Directing Entry of Judgment For Repondent Has Not Denied Petitioner a Full Trial on the Merits Concerning Issues as to Which She Had Every Opportunity to Present Evidence Before The District Court and Does Not Conflict With a Prior Decision of This Court.

Petitioner believes that the Tenth Circuit has raised an important question of federal law by denying her a full trial on the merits concerning issues as to which she had no opportunity to present evidence before the district court by granting judgment to respondent instead of remanding for trial. Specifically, petitioner alleges that she should be given an opportunity to be

heard on issues relating to whether the endorsement to the insurance policy was brought to decedent's attention and, further, whether the endorsement was inconspicuous as a matter of public policy.

Neither contention was raised in petitioner's complaint filed in state district court nor, after removal to federal district court, in her motion for summary judgment, or in her reply memorandum to respondent's motion for summary judgment. Petitioner had every opportunity to raise these issues in the district court but apparently elected not to do so. Petitioner discusses the specific language of the endorsement in her motion for summary judgment and even anticipated respondent's interpretation of the meaning of the language without making any mention or reference to the

issue of its conspicuousness as a matter of policy or decedent's awareness of the endorsement. Petitioner did not otherwise seek to amend her complaint or move for partial summary judgment and thereby preserve these issues for a later factual determination, or in any other manner or pleading allege that these were genuine litigable issues of material fact requiring specific factual determinations independent of the district court's consideration of the coverage issue. The requirements of due process of law set forth in the Fifth Amendment to the United States Constitution were, therefore, satisfied. As petitioner acknowledges in her petition, the Tenth Circuit itself determined in its opinion that the district court was not asked to make any finding of fact on the conspicuousness of the endorsement and so

the court never reached the issue on appeal. 836 F.2d 1287 at 1291. Matters not raised in the trial court cannot be raised for the first time on appeal.

Petitioner contends that the opinion of the Tenth Circuit allegedly depriving her of an opportunity to present evidence on certain factual issues is in conflict with Fountain v. Filson, 336 U.S. 681, 69 S. Ct. 754, 93 L.ed. 971 (1949) and the reasoning of Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719, 85 L.ed 1040 (1941). On both points, respondent disagrees.

In Fountain, plaintiffs brought suit to establish a resulting trust in certain real estate and otherwise alleged facts in their complaint on which personal liability of defendants could be established and for which they asserted a general prayer for relief. From the

district court's entry of summary judgment for defendants, the plaintiffs appealed and the court of appeals reversed, directing the district court to enter personal judgment against defendants. A petition for writ of certiorari to the court of appeals was granted, and the Supreme Court reversed for the reason that the order of the appellate court gave the defendants no opportunity to present a defense to the alleged personal obligation to plaintiffs.

The personal obligation of defendants in Fountain was a genuine issue of material fact arising out of the allegations contained in the complaint, the answer of defendants, and the facts set forth in the transcript of depositions taken before trial for which summary judgment under F.R. Civ. P. 56

was not appropriate. This is readily distinguishable from the instant case in which petitioner made no such claim, assertion, or request for factual determination by the district court on the issues relating to conspicuousness of the endorsement as to public policy and awareness of the insured as to the contents of the endorsement in any of the pleadings from the complaint through her motion for summary judgment and reply brief.

Petitioner also looks to the analysis and reasoning of this Court in Hormel v. Helvering, supra, which involved the legal basis for the Commissioner of Revenue's assessment of income tax deficiency against the grantor of a trust and the applicability of a new section of the Internal Revenue Code first raised in the circuit court of

appeals. This Court determined that the case came within the exception to the general rule that parties to litigation should have the opportunity to offer evidence on issues of fact based upon a new theory before the trial court, since this was a case in which Congress gave the circuit courts of appeal broad authority to review and deal with decisions of the Board of Tax Appeals. Unlike this case, Hormel involved a question of taxpayer liability, in which decision this Court viewed a change in the law during the course of appeal of the case as significant. No changes in the law or broad enabling legislation appear in this case.

Hence, the authorities cited by petitioner are readily distinguishable from the instant case and do little to support her argument that an important

principal of federal law requires this court to grant certiorari. Indeed, quite the contrary.

A substantial body of law upholds the propriety of an appellate court disposing of a case in accordance with the law and the facts by ordering that summary judgment be entered for appellant and thus avoiding the necessity of further proceedings, Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 93 S. Ct. 1736, 36 L.ed.2 503 (1973); Mourning v. Family Publications Service, Inc., 411 U.S. 356, 91 S. Ct. 1652, 36 L.ed.2 318 (1973); U.S. v. Mitchell, 403 U.S. 190, 91 S. Ct. 1763, 29 L.ed.2 406 (1971); Sayre v. City of Cleveland, 493 F.2d 64 (6th Cir. 1974), cert. denied, 419 U.S. 837 (1974); Stein v. Oshinsky, 348 F2d 999 (2nd Cir. 1965), cert. denied, 382 U.S. 957 (1965);

International Longshoremens & Warehousemens Union v. Kuntz, 334 F.2d 165 (9th Cir. 1964); 6.J. Moore, Federal Practice Part 2, Para. 56.27[2] (2d ed. 1987); 10 C. Wright, Federal Practice and Procedure, § 2716 (2nd ed. 1983). This procedure is especially applicable in a situation such as here where the issue as framed by the petitioner's pleadings was one of law, to wit, the construction and interpretation of contractual language.

Petitioner also would have this Court believe that her Seventh Amendment right to trial by jury has been abrogated. This argument cannot be sustained, because, as we have seen, no genuine issue of material fact exists for further consideration by the district court. See, 10 C. Wright, Federal Practice and Procedure, § 2714 (2d. ed. 1983). Moreover, petitioner in the

pretrial order waived her right to a jury trial on the only other remaining issue of double indemnity under the accidental death provisions of the insurance policy. In any event, this case comes within the provisions of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et. seq., and there is no independent constitutional or statutory right to jury trials in ERISA actions, Wardle v. Central States Southeast and Southwest Areas Pension Fund, 627 F.2d 820, 828-830 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981); Blau v. Del Monte Corp. 748 F.2d 1348 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985); Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980); Gilliken v. Hughes, 609 F. Supp. 178 (D. Del. 1985).

## II.

## The Tenth Circuit Decision Does Not Conflict With The Decisions of Other Federal Courts of Appeal On The Same Matter.

Petitioner states that the decision of the Tenth Circuit is in conflict with the decisions of numerous other federal courts of appeals, and therefore alleges that this Court should reverse and decide this case in a way that establishes a uniform rule among the various circuits. Petitioner cites many cases, each of which is, however, distinguishable from the instant case.

From the Ninth Circuit are cited two cases, Smith v. United States, 362 F.2d 366 (9th Cir. 1966) and Roberts v. Hollandsworth, 582 F.2d 496 (9th Cir. 1978). In Smith, the appellate court vacated a district court judgment

dismissing an action brought against the United States for the taking of plaintiff's buildings for past taxes. The Ninth Circuit remanded for a full trial after some facts elicited on oral argument disclosed the need for "a full development of the facts" relating to the standing of plaintiff to bring the action. Quite simply, the Smith case is not applicable here. The question of standing of plaintiffs in Smith to bring the action goes to the very basis on which they brought the case. No such jurisdictional issue is here present where, as the surviving spouse, petitioner had clear standing to commence suit for recovery of the face amount of the policy on her husband's life.

In Roberts v. Hollandsworth, supra, the Ninth Circuit reversed summary judgment entered for defendants and

against plaintiff for the reason that the district court, in granting defendants' motion for summary judgment, was led to believe by ineptness of trial counsel that plaintiff's claims were fraud, conspiracy to defraud and conversion in an amended complaint described as other than "a model pleading". The ineptitude of counsel in district court effectively resulted in failure to plead another theory of law based on money had and received, and so the appeals court reversed and remanded for further consideration of facts substantiating the new claim. No such facts or rationale apply in this case where ability of opposing counsel is not in question.

Tomalewski v. State Farm Life Insurance Company, 494 F.2d 882 (3rd Cir. 1974) is cited by petitioner as another case in conflict with the opinion of the

Tenth Circuit. We disagree. Notwithstanding the issue of fact presented by the widow's claim of having received a gift of an insurance policy patently appearing in the pleadings, the district court granted summary judgment in favor of the insured's mother under a life policy, holding as a matter of law that she was entitled to the proceeds of the policy. On appeal, the Third Circuit reversed the judgment and remanded for further proceedings. In the instant case, no plain issue of fact concerning conspicuousness of the endorsement as a matter of public policy or awareness of the endorsement appeared from the pleadings. Quite the reverse. In no pleading before the district court did petitioner seek or ask the court to make a determination of fact on either of these issues.

Nor is the case from the Fifth Circuit cited by petitioner in her brief of any support to her position that a conflict in holdings between the circuits requires this Court to grant her petition for writ of certiorari. In Black Warrior Electric Membership Corp. v. Mississippi Power Company, 413 F.2d 1221 (5th Cir. 1969), the Fifth Circuit recognized that the district court had not reached a question which was raised in the original complaint but was not raised in a motion for summary judgment and so remanded for further proceedings. In the instant case, no such issues relating to decedent's awareness of the endorsement or to conspicuousness of the document as a matter of public policy were raised in the district court for its consideration.

Finally, M. Snower & Co. v. United States, 140 F.2d 367 (7th Cir. 1944) is

not in conflict with the Tenth Circuit opinion as opposing counsel would have this Court believe. In fact, the case merely stands for the basic proposition that an order for summary judgment by the district court is in error where it fails to address a genuine issue of material fact patently appearing in the pleadings. Again, no such issues as are now pressed by petitioner appeared nor were pled before the district court. Accordingly, the M. Snower case is also distinguishable from the instant matter.

In summary, the above cases cited by petitioner are distinguishable from this case and comport with the usual course of judicial proceedings for which this Court's power of supervision in this case is not justified nor required.

## III.

## The Decision Below Does Not Create An Intra-Circuit Conflict On The Same Issue.

Petitioner cites the holding of Eagle v. Louisiana and Southern Life Insurance Co., 464 F.2d 607 (10th Cir. 1972) as a Tenth Circuit case in conflict with the decision below, since, in Eagle, the appellate court permitted the claimant and surviving spouse a full trial on the merits of her claim to recover on a group life insurance policy of which decedent was beneficiary where a genuine issue of a material fact concerning coverage existed. On its face, the Eagle decision is distinguishable from the instant matter, because no such question of material fact relating to coverage needed to be resolved after cross motions for summary

judgment were ruled upon in this matter. The interpretation and construction of the policy language concerning the coverage issue in the case at bar was a pure question of law that was appropriately decided on summary judgment.

Moreover, in Eagle, the district court granted plaintiff's motion for summary judgment, but made no statement of facts which it deemed pertinent and gave no reasons or rationale for its order granting summary judgment. Accordingly, the Tenth Circuit was unable to pass upon the merits of the controversy and so remanded for a full trial on the merits. See, Solinger v. A&M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979). Here, the district court made a detailed statement of its factual

determinations and rationale for its holding, even if partially in error, that afforded a sound basis for the Tenth Circuit to direct entry of judgment for defendant.

Thus, there is no irreconcilable conflict within the Tenth Circuit relating to, as petitioner alleges, "a recurring and important issue" of the power of appellate courts to order summary judgment for appellant.

## CONCLUSION

For all of the above reasons, respondent respectfully requests that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

Grant, McHendrie, Haines and
Crouse
Professional Corporation
Donald M. Burkhardt
One United Bank Center
1700 Lincoln Street
Suite 3000
Denver, Colorado 80203-1086
(303) 825-5111

Counsel of Record for the
Respondent

Supreme Court, U.S.
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CLERK

No. 87-2112

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

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PAMELA J. BURAK, *Petitioner,*

*v.*

GENERAL AMERICAN LIFE INSURANCE COMPANY,
*Respondent.*

---

*REPLY IN SUPPORT OF PETITION*
*FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

---

SAMUEL LEE ANDERSON
323 South College Avenue,
Suite 3
Fort Collins, CO 80524
(303) 482-4011
*Counsel of Record*

KENT N. CAMPBELL
323 South College Avenue,
Suite 3
Fort Collins, CO 80524
(303) 482-4011
*Counsel for Petitioner*

TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... ii

REPLY TO OPPOSITION TO GRANTING THE WRIT .... 1

I. Respondent Misapprehends That The Unlitigated Coverage Issues Were Raised By The Complaint Under Notice Pleading And That The Tenth Circuit Order Directing Entry Of Judgment For Respondent Deprives Petitioner Of A Full Trial On These Issues And Conflicts With a Prior Decision Of This Court ..... 1

II. The Other Circuit Courts of Appeals With Which The Tenth Circuit Is In Conflict Remanded The Proceedings For Resolution Of Material Factual Issues ..... 5

III. The Decision Below Does Create An Intra-Circuit Conflict On The Same Issue ..... 5

CONCLUSION ..... 6

TABLE OF AUTHORITIES

Page

*Cases:*

*UNITED STATES SUPREME COURT DECISIONS:*

*Conley v. Gibson*, 355 U.S. 41 (1957) ..... 2

*Fountain v. Filson*, 336 U.S. 681 (1949) ..... 1, 2

*Hormel v. Helvering*, 312 U.S. 552 (1941) ..... 1, 2

*Kern County Land Company v. Occidental Petroleum Corporation*, 441 U.S. 582 (1973) ..... 3

*Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973) ..... 3

*United States v. Mitchell*, 403 U.S. 190 (1971) ..... 4

*CIRCUIT COURTS OF APPEALS DECISIONS:*

*Abrams v. Occidental Petroleum Corp.*, 450 F.2d 157 (2d Cir. 1971) ..... 3

*Angello v. Metropolitan Life Insurance Company*, 430 F.2d 7 (5th Cir. 1970) ..... 4

*Eagle v. Louisiana and Southern Life Insurance Company*, 464 F.2d 607 (10th Cir. 1972) ..... 5, 6

*International Longshoremen's and Warehousemen's Union v. Kuntz*, 334 F.2d 165 (9th Cir. 1964) ..... 4

*Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974), *cert. denied*, 419 U.S. 837 (1974) ..... 4

*Stein v. Oshinsky*, 348 F.2d 999 (2d Cir. 1965), *cert. denied*, 382 U.S. 957 (1965) ..... 4

*STATUTE:*

29 U.S.C. §1001 *et seq.* ..... 5

*RULES:*

Fed. R. Civ. P. 8(a) ..... 3

Fed. R. Civ. P. 8(f) ..... 3

Fed. R. Civ. P. 56 ..... 2

*MISCELLANEOUS:*

2A J. Moore, *Federal Practice* (2d ed. 1987) ..... 2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

---

PAMELA J. BURAK, *Petitioner,*

*v.*

GENERAL AMERICAN LIFE INSURANCE COMPANY,
*Respondent.*

---

*REPLY IN SUPPORT OF PETITION*
*FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

---

REPLY TO OPPOSITION TO GRANTING THE WRIT

I.

Respondent Misapprehends That The Unlitigated Coverage Issues Were Raised By The Complaint Under Notice Pleading And That The Tenth Circuit Order Directing Entry Of Judgment For Respondent Deprives Petitioner Of A Full Trial On These Issues And Conflicts With A Prior Decision Of This Court

Respondent seeks to distinguish the Court's decisions in *Fountain v. Filson*, 336 U.S. 681 (1949) and *Hormel v. Helvering*, 312 U.S. 552 (1941) by arguing that petitioner's complaint was deficient for not having specifically alleged that (1) the insurance policy endorsement was inconspicuous and (2) the insured was unaware of the endorsement.

Petitioner's complaint alleged there was coverage under the policy. The aforementioned issues concern — indeed, determine — coverage. The issues are embraced within the allegation that there was coverage and petitioner is entitled to the policy proceeds. Thus, the complaint was sufficient to raise these issues.

When petitioner mentioned the issue of endorsement inconspicuousness in oral argument before the court of appeals, it was error to deprive her of an opportunity to present the facts material to that claim by, in essence, ordering summary judgment against her. *See Fountain*, 336 U.S. at 683. *Fountain* requires petitioner be given the chance to litigate these issues in the trial court.[1]

The Court's decision in *Hormel* turned on broad principles of "fundamental justice," not the fact that the case involved questions of tax law. *See Hormel*, 312 U.S. at 557-60. It also requires this case be remanded to the trial court.

Respondent misapprehends rules of notice pleading. The modern objectives of notice pleading are satisfied by a "generalized summary of the case that affords fair notice [which is] all that can be expected." 2A J. Moore, *Federal Practice*, ¶8.03 (2d ed. 1987); *Conley v. Gibson*, 355 U.S. 41 (1987). The pleading rules are designed to "reduce the pleading requirements to a minimum." Moore at ¶8.02. The real importance of the pleading rules is "that they make pleadings, in and of themselves, relatively unimportant." *Id.* "Cases are to be decided on the merits." *Id.*

Respondent would have the courts deny petitioner's right to try meritorious issues on the basis that she did not set out in detail in her complaint the facts on which she bases her claim. This is contrary to law and enlightened modern federal practice. *See Conley*,

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[1] The only difference between this case and *Fountain* (which difference is not of significance insofar as the conflict with the instant case is concerned) is that summary judgment there had been directed by the appellate court against the *defendant* thereby wrongfully depriving her of the opportunity to litigate her *defense* to the claim. Here the *plaintiff* was wrongfully deprived by the Tenth Circuit of an opportunity to litigate certain *claims*. In both cases a fundamental deprivation of rights occurred through a misapplication of Fed. R. Civ. P. 56 through the grant of summary judgment to an appellant despite that factual issues had become apparent on appeal.

355 U.S. at 47. All the rules require is "a short and plain statement of the claim." *Id.*; Fed. R. Civ. P. 8(a).

All pleadings are to be construed "as to do substantial justice." *Conley, supra;* Fed. R. Civ. P. 8(f). Respondent would have petitioner's complaint be construed to work a substantial injustice.

The Tenth Circuit's decision conflicts with this Court's holding in *Fountain* and the reasoning underlying *Hormel.* Respondent has not shown otherwise. Nor has respondent cited authority upholding the disposition of a case by an appellate court by ordering summary judgment be entered for the appellant where factual issues have been pointed out during oral argument on appeal as occurred here.

In *Kern County Land Company v. Occidental Petroleum Corporation,* 411 U.S. 582 (1973), the Court only decided a narrow question concerning construction of a provision of the Securities Exchange Act of 1934, §16(b). Certiorari was not granted to decide the issue presented here, nor did the Court's opinion mention the propriety of the appellate court's grant of summary judgment to the appellant.

Unlike here, the court of appeals in the *Kern County* case observed that "inquiry at the argument failed to reveal any new facts that might be adduced by [the parties against whom the appellate court directed summary judgment] at an evidentiary hearing." *Abrams v. Occidental Petroleum Corp.*, 450 F.2d 157, 166 (2d Cir. 1971), *aff'd sub nom. Kern County Land Company v. Occidental Petroleum Corporation,* 411 U.S. 582 (1973). The appellate court also noted that certain factual conflicts had no "dispositive significance," *id.*, whereas here the questions of (1) whether the endorsement was inconspicuous and unenforceable and (2) whether the endorsement was brought to decedent's attention are dispositive issues which the trial court should decide initially.

In *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), also relied on by respondent, certiorari was granted "to resolve whether the Federal Reserve Board exceeded its authority under Section 105 of the Truth in Lending Act in promulgating that portion of Regulation Z commonly referred to as the 'Four Installment Rule.' " 411 U.S. at 358 (footnote omitted). The Court was not asked to nor did it decide the question of whether an appellate court can grant an appellant summary judgment in

circumstances similar to this case. Further, there was no indication in the Court's opinion or that of the appellate court of a material factual question to be tried. *Id.*; 449 F.2d 235 (5th Cir. 1971). That alone distinguishes the case.

The other United States Supreme Court decision relied on by respondent, *United States v. Mitchell*, 403 U.S. 190 (1971), merely decided an issue of federal income taxation on community income to a married woman in a community property state despite the exercise of her statutory right of exoneration. There was no discussion or consideration of whether the appellate court acted properly when it reversed the trial court's grant of summary judgment but did not remand for trial. Moreover, there was no mention of any material factual issues in the appellate court's opinion requiring resolution in the trial court, unlike here. *Angello v. Metropolitan Life Insurance Company*, 430 F.2d 7 (5th Cir. 1970), *rev'd sub nom. United States v. Mitchell*, 403 U.S. 190 (1971).

The same is true of the other authorities relied on by respondent. *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974), *cert. denied*, 419 U.S. 837 (1974) (finding no facts in dispute); *Stein v. Oshinsky*, 348 F.2d 999, 1002 (2d Cir. 1965), *cert. denied*, 382 U.S. 957 (1965) (stating "Plaintiffs' attorney has consistently maintained that all the facts are . . . before the court; he did not indicate in argument that any facts warranting a different decision could be alleged or proved. Under these circumstances, we perceive no reason for not bringing this litigation to an end."); *International Longshoremen's and Warehousemen's Union v. Kuntz*, 334 F.2d 165, 168 (9th Cir. 1964) (absence of any genuine issues of material fact "demonstrated conclusively," according to the court's opinion).

Petitioner has been deprived of her Seventh Amendment right to trial by jury of the aforementioned coverage issues. Petitioner waived her right to jury trial only as to the double indemnity claim which was tried May 29, 1985. By then the trial court had already granted her summary judgment on the underlying life insurance coverage. She has therefore not waived her jury demand as to the aforementioned coverage issues which remain to be tried in view of the Tenth Circuit's construction of the policy endorsement effective date language.

Petitioner's right to jury trial is not precluded by the Employee

Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq*. This action does not attack in any manner the integrity or administration of the group insurance plan that decedent's employer provided for its employees. Rather, the essence of the action is simply to pursue a claim for the proceeds petitioner asserts is due her as beneficiary of the policy in question. Thus, there is no basis for a conclusion that Congress intended that every claim against an insurance company under its group insurance plan should be litigated with exclusive ERISA remedies. ERISA is not controlling here and does not preempt petitioner's right to jury trial.

II.

The Other Circuit Courts Of Appeals With Which The Tenth Circuit Is In Conflict Remanded The Proceedings For Resolution Of Material Factual Issues

Respondent expends great effort trying to factually distinguish this case from the numerous other circuit courts of appeals' decisions which are in conflict with the instant case. The reasons by which respondent tries to distinguish the cases were not the controlling facts in those cases.

Moreover, respondent overlooks that this petition presents the same simple question decided differently in the other circuits, namely, whether a federal court of appeals can direct summary judgment in an appellant's favor after the appellee has raised material factual issues during oral argument on appeal.

As to this issue, there is a direct conflict among the circuits. This Court should resolve the conflict.

III.

The Decision Below Does Create An Intra-Circuit Conflict On The Same Issue

Respondent urges there is no intra-circuit conflict because the Tenth Circuit in *Eagle v. Louisiana and Southern Life Insurance Company*, 464 F.2d 607 (10th Cir. 1972) was faced with material

factual issues concerning coverage and in this case the court allegedly just had to interpret and construe policy language which respondent urges presented a pure question of law.

This overlooks that the defendant insurers in *Eagle* contended that the terms of the policy entitled them to summary judgment, arguing that the outcome was controlled by "unchallenged documentary evidence." *Id.* at 608. Nevertheless, the *Eagle* panel decided the case was not a proper one for summary judgment, explaining that the rights of the parties required determination after a "full-fledged trial of the merits." *Id.* at 609. This was due to the fact that a controversy raged between the parties over whether the decedent's employer had elected to participate in the policy and whether anything further remained to be done. *Id.* at 608.

This is not unlike the controversy that exists here over (1) whether decedent's employer ever made decedent aware of the policy endorsement dealing with the effective date of coverage and (2) whether the endorsement language was so inconspicuous as to violate public policy. In both cases resolution of the factual disputes controls the outcome despite the documentary evidence regarding the effective dates of coverage.

Although the trial court here made detailed factual findings on the endorsement language itself, it never made findings on the two above-mentioned issues which require resolution and should have resulted in a remand from the Tenth Circuit.

Respondent has failed to distinguish *Eagle* as to the issue presented. There is a direct intra-circuit conflict which requires this Court's resolution.

## CONCLUSION

The Tenth Circuit should have remanded this case to the trial court for resolution of the factual issues, one of which, due to the procedural posture of the case, was first mentioned on appeal. This Court is respectfully requested to direct the Tenth Circuit to remand the case to the district court for a trial of the aforementioned coverage issues which, if ultimately decided in petitioner's favor, would render the endorsement unenforceable and allow coverage to decedent's widow beneficiary.

Respectfully submitted,

SAMUEL LEE ANDERSON
323 South College Avenue,
Suite 3
Fort Collins, CO 80524
(303) 482-4011
*Counsel of Record*

KENT N. CAMPBELL
323 South College Avenue
Suite 3
Fort Collins, CO 80524
(303) 482-4011
*Counsel for Petitioner*